In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 540

ADELE WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is the fourth action brought by petitioner to recover the proceeds of two National Service Life Insurance policies. Petitioner's theory in each case has been that cash dividend payments declared after the lapse of these policies for failure to pay premiums should have been used by the Veterans' Administration to keep the policies in force. The first action was commenced on March 2, 1949, in the United States District Court for the Eastern District of New York. The Government's motion to dismiss was granted. *Weiss* v. *United States*, 92 F. Supp. 322. The Court of Appeals for the Second Circuit affirmed

(187 F. 2d 610). This Court denied a petition for certiorari (342 U. S. 820), a petition for rehearing (342 U. S. 874), and a motion for leave to file a second petition for rehearing (342 U. S. 915).

The second action was commenced on November 26, 1951, in the same District Court,[1] relying upon almost the identical theory, and the Government moved to dismiss the action as *res judicata* and on the ground that the policies sued upon had lapsed for non-payment of premiums. Summary judgment was granted. *Weiss* v. *United States,* 103 F. Supp. 470. The Court of Appeals affirmed *per curiam* on the opinion of the District Court and its own prior decision (199 F. 2d 454). This Court denied certiorari (344 U. S. 934) and a petition for rehearing (345 U. S. 914).

A third complaint was filed on March 19, 1953, relying again on substantially the same theory of law, and the Government moved for summary judgment on the same grounds as had been advanced in the second suit. The District Court granted the motion on the basis of the prior decisions of the Court of Appeals (Pet. 6). The Court of Appeals affirmed *per curiam* on the opinion of the District Court (207 F. 2d 503). This Court de-

[1] The second, third, and fourth actions were ostensibly brought under the authority of Rule 60 (b) of the Federal Rules of Civil Procedure to vacate and amend the prior judgments. As the court below noted, however, they were merely attempts to relitigate the same "fundamental thesis" (Pet. 25).

nied a petition for certiorari (346 U. S. 924) and a petition for rehearing (347 U. S. 908).

The present action was begun on February 19, 1954. Again, the theory upon which petitioner relies has not been materially altered. Indeed, even if a different theory of law had been suggested by petitioner, relief would not have been appropriate. The District Court granted a motion by the Government for summary judgment (R. 5), and for a fourth time the Court of Appeals affirmed the District Court's ruling (Pet. 24–25). Not only did the Court of Appeals conclude that this was the same action which had been denied on three previous occasions but it added that "further vexatious litigation to reopen this hopeless case will subject counsel personally to the costs thereof, as provided in 28 U. S. C. Sec. 1927" (Pet. 25).

CONCLUSION

For the reasons set forth in the Government's briefs in opposition filed in connection with the three previous decisions of the Court of Appeals,[2] to which this Court is respectfully referred, the holding of the courts below is plainly correct. Accordingly, no further review is warranted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

SAMUEL D. SLADE,
RICHARD M. MARKUS,
Attorneys.

DECEMBER 1955.

[2] *Weiss* v. *United States*, No. 115, October Term, 1951; No. 507, October Term, 1952; No. 467, October Term, 1953.

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Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

As the Government has no defense to these claims it now resorts to a misstatement of fact.

Petitioner's attorney swears under the penalty of perjury that petitioner never predicated her claim upon dividends.

Tobias Smollett stated:

"Facts are stubborn things."

John Tyndall stated:

"It is as fatal as it is cowardly to blink facts because they are not to our taste."

Eugene Fitch Ware stated:

"The soul of the fact is its truth, * * *."

John Masefield stated:

"There is another way to truth: by the minute examination of facts. * * *."

Benjamin Disraeli stated:

"Justice is truth in action."

CONCLUSION

All that these beneficiaries request is that they be granted the same rights granted to other litigants namely an opportunity to present the *true* facts.

Upon the foregoing and the reasons stated in the petition, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Attorney for Petitioner.